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Supreme Court of The United States

OCTOBER TERM, 1976

NO. 76-1486

ROBERT FRANKLIN BROWN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO
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QUESTIONS PRESENTED

1.

Whether, in a prosecution for murder where the State has not waived the death penalty, the Fifth and Sixth Amendments to the United States Constitution were offended by the exclusion of three prospective jurors who were opposed to the death penalty.

2.

Whether a confession, which Petitioner, after being advised of his Miranda rights, made to a sheriff whom he knew well and frequently conferred with, is inadmissible because it was made at the county courthouse on the first Monday following the Saturday night on which Petitioner was carried to the sheriff's office at the county jail.

3.

Whether the refusal to grant Petitioner a continuance of one week in which to prepare for trial deprived him of due process where he was tried approximately one month after he was indicted and had assistance of counsel which he retained at least three months prior to the trial and present counsel which he retained five days before trial.

4.

Whether Petitioner was deprived of due process when the trial judge recharged the jury with respect to murder, voluntary manslaughter and involuntary manslaughter in accordance with the request of the jury.

STATEMENT OF CASE

This case arises out of the death of Shirley Brown, the paramour of Petitioner.

At approximately 9:00 P.M., Saturday, March 29, 1975, Mr. Earl Lee who is sheriff of Douglas County, Georgia, was called by Petitioner and told that Shirley Brown ("victim") had shot herself. (T. 83-84). Approximately twenty minutes later the sheriff arrived on the scene. (T. 84).

When the sheriff arrived, he consulted with Sergeant Latham who had arrived at the scene of the shooting earlier. (T. 85). He then observed that the victim's body appeared to have received three wounds. (T. 86). He also observed that the victim's hand contained a pistol; her finger was on the trigger. (T. 94). He performed a preliminary examination of the pistol.

After completing an investigation of the scene of the shooting, the sheriff took Petitioner down to the county jail with him. (T. 98). However, Petitioner was not charged with a crime. (T. 98).

Sheriff Lee left Petitioner at the "book-in" and went to observe an autopsy performed on the victim's body. The sheriff returned early Sunday morning and advised Petitioner of his Miranda rights. (T. 101). This interview was recorded and the recording shows that the Petitioner was plainly advised of his right to have counsel present during questioning. (T. 139). No physical force, threats, promise of reward, or other inducement was used to encourage Petitioner to answer the sheriff's questions. (T. 102). Petitioner did not tell the sheriff who shot the victim at that time.

The next day, Sheriff Lee took Petitioner to the Douglas County Superior Court. (T. 103). There, Petitioner indicated that he wanted to talk with the sheriff and Sheriff Lee advised him of his Miranda rights. Petitioner then told the sheriff how he had shot the victim in a fit of anger. (T. 104). Approximately two to four hours later, the sheriff recorded Petitioner's statement. (T. 150). The statement was not recorded at the time that it was given because the sheriff was away from his office and unprepared due to the spontaneous nature of the statement. (T. 149).

The statement which Petitioner made to the sheriff was substantially as follows: On the night of March 29, 1975, Petitioner and the victim were arguing about how the victim should be dressed in public. The victim apparently did not appreciate Petitioner advising her how to dress and told him that she would become the biggest whore in the county. Petitioner became angry and shot the victim once, at which time she turned, then he shot her again. After saying that she would not bother him again, the victim died. (T. 161-162).

At trial a hearing in accordance with Jackson v. Denno, 378 U.S. 368 (1963) was held. The sheriff presented the foregoing version of his investigation of the case. Petitioner did not deny that the sheriff had advised him of his Miranda rights, but asserted that he did not understand that he could have a lawyer present during questioning. (T. 124-126). Petitioner also claimed that when he was taken to the county jail his stomach was upset and his head was hurting as the result of a five to fifteen minutes struggle with the victim and what had happened. (T. 121, 123). Petitioner admitted that when he requested permission to call a lawyer, his request was granted. (T. 125).

The trial court allowed the Monday confession to be admitted into evidence. (T. 128-129). In the presence of the jury the sheriff repeated his testimony. He also testified that Petitioner did not suggest in any way that he was ill or needed medication until several days after he was taken to jail and after he had confessed to killing the victim. Even then, he only asked for some prescribed medicine. (T. 136).

The trial court also found a Tuesday statement relating to the shooting of the victim admissible after a Jackson v. Denno hearing. (T. 172-179). In that statement Petitioner admitted shooting the victim, but denied intending to kill her. (T. 184-185).

Mr. Kelly Fite of the State Crime Laboratory testified that one of the bullets which caused the victim's death was fired at a distance of eighteen inches or more from the victim's body. (T. 235).

After hearing closing arguments and hearing evidence, Petitioner was convicted of voluntary manslaughter. (T. 322).

Petitioner appealed his conviction to the Georgia Court of Appeals and that court affirmed. Brown v. State, 140 Ga. App. 160 (1976). Petitioner then applied to the Georgia Supreme Court for a writ of certiorari, but that court denied the petition. Petitioner now applies to this Court for review on a writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

A. THE EXCLUSION OF THREE JURORS IN A MURDER CASE WHEN THE STATE HAS NOT WAIVED THE DEATH PENALTY IS NOT AN ISSUE OF SUCH AN EXTRAORDINARY NATURE THAT THIS COURT SHOULD GRANT A PETITION FOR THE WRIT OF CERTIORARI.

It is contended by Petitioner that Furman v. Georgia, 408 U.S. 238 (1973), and Gregg v. Georgia, __U.S.__, 49 L.Ed. 2d 859 (1976), require that his conviction be reversed. This contention seems to be based on the argument that the killing of the victim in this case was not such that it could possibly be considered (even in theory) a proper case for the imposition of the death pnealty and thus, the exclusion of three persons from the jury on the basis of their opposition to the death penalty deprived him of an impartial jury. This argument lacks substance and cannot be supported.

In Gregg v. Georgia, supra, this Court, reviewing the Georgia death penalty statute, noted expressly that whenever a defendant is tried for murder in Georgia, there is a possibility that the death penalty will be imposed. Id, at 890. In ruling that murder

is a capital felony in Georgia, the Georgia Court of Appeals did no more than recognize that murder is an offense for which imposition of the death penalty is a possibility which is what the United States Supreme Court did in the Gregg decision. It follows that the affirmance of the trial court's action regarding the exclusion of three prospective jurors who were opposed to the death penalty was proper. Witherspoon v. Illinois, 391 U.S. 510 (1967). In addition whether any particular murder case is appropriate for the imposition of the death penalty cannot be determined until the person being tried has been convicted. Ga. Code Ann. §27-2534.1(b). Then, the jury which has convicted the defendant must impose the death penalty. Miller v. State, 237 Ga. 557 (1976). Moreover, since the trial judge had no discretion concerning the imposition of the death penalty in a jury case, his only authority was to rule on the issue actually presented by the State when it challenged the prospective jurors.

Furthermore, Furman was only concerned with the procedures under which the death penalty may be imposed. This Court held that Ga. Code Ann. §27-2534.1 rectified the procedural difficulties disapproved

in Furman v. Georgia, supra. Since the changes are procedural it would seem to follow that Georgia's designation of murder as a capital felony would be unaffected by Furman. See Dobbert v. Florida, __U.S.__45 U.S.L.W. 4721 (1977).

However, even if the present case conflicted with the Gregg and Furman cases in some way, Petitioner is still not entitled to relief. The Furman and Gregg cases are concerned with the constitutionality of the death penalty in Georgia, not the selection of jurors. Consequently, those cases are inapplicable to the present case. The present case seems to come within the rule of Bumper v. North Carolina, 391 U.S. 543 (1967). In that case, the Petitioner had been tried for a capital offense but received a life sentence. In this Court, the Petitioner argued that the exclusion of prospective jurors who were opposed to capital punishment deprived him of an impartial jury at trial. Citing Witherspoon v. Illinois, supra, this Court held that since the Petitioner was not sentenced to death and had failed to prove that the jury which tried him was prone to convict, relief would be denied on that ground. Although Petitioner in the present case does not expressly argue

that he was deprived of the right to an impartial jury, he does state that the three excluded jurors may have favored acquittal in his case. To the extent that such a statement may be considered a claim of denial of the right to an impartial jury, Petitioner is in no better position than the Petitioner in the Bumper case. He is thus not entitled to receive relief.

B. WHERE PETITIONER, AFTER BEING ADVISED OF HIS MIRANDA RIGHTS, MADE A CONFESSION TO A SHERIFF WHOM HE KNEW WELL AT THE COUNTY COURTHOUSE IN THE ABSENCE OF A COERCIVE ATMOSPHERE, HIS CONFESSION WAS ADMISSIBLE INTO EVIDENCE.

It is also contended by Petitioner that his conviction should be reversed because it rests upon an illegal confession. In support of this contention, Petitioner has made numerous allegations including that he was interrogated in a coercive atmosphere, that he was denied access to counsel, that he was physically distraught and that he did not understand his Miranda rights when they were given.

The trial record shows that before any statement which Petitioner made was introduced into evidence, the trial court held a hearing in accordance with the requirements of Jackson v. Denno, 378 U.S. 368 (1963). With respect to each in-custody statement made by Petitioner, the trial court found that the voluntariness of the statement was supported by a preponderance of the evidence. Leggo v. Twomey, 404 U.S. 477 (1972). Since Petitioner has limited his attack to the confession which he made on Monday at the county courthouse and Tuesday at the sheriff's office, the discussion herein will be similarly limited.

Prior to making his Monday confession to Sheriff Lee of Douglas County, Georgia, Petitioner had been advised of his Miranda rights at least twice. (T. 101, 148). There is some conflict as to whether Petitioner first asked about a lawyer on Sunday, March 30, 1975, or the following day. However, at trial, Sheriff Lee stated specifically that Petitioner did not ask to see a lawyer until after he had given his Monday confession. (T. 155). Moreover, the Monday confession was not obtained as the result of interrogation, but it was volunteered by Petitioner. (T. 148, 150). The confession took place at the county courthouse while Petitioner was being carried to court to have an attorney appointed to represent him. Furthermore, there is evidence that Petitioner was accorded every opportunity to gain access to an attorney or other persons whom he knew and there was evidence that Petitioner had associated with the sheriff on prior occasions. (T. 190-191).

In view of these circumstances, it is apparent that Miranda v. Arizona, 384 U.S. 436 (1965), is not involved in anyway in the present case, and Petitioner was not coerced to relinguish its protection. Indeed, the particular confession which Petitioner now attacks was not obtained as the result of interrogation.

Rather, as the record shows, Petitioner initiated the interview and was the only speaker during the entire interview.

The Petitioner also argues that the present case is controlled by Brewer v. Williams, __U.S.__, 51 L.Ed. 2d 424 (1977). This argument cannot be supported by the record, In Brewer v. Williams, supra, this Court affirmed the judgment of the Court of Appeals granting Williams a new trial. In reaching its decision, this Court noted particularly that at the time that Williams made his confession he had a constitutional right to counsel as there was no doubt that judicial proceedings had been initiated against him. Id., at 436. Having determined that Williams had a right to assistance of counsel, this Court turned its attention to a consideration of whether Williams had waived the right. After a review of the record in the Brewer case. this Court concluded that there was insufficient evidence to show that Williams had waived his right to counsel. Sub judice, at the time of his confession, Petitioner had not been arraigned and there was no warrant for his arrest. The only connection which the judiciary had with Petitioner was that Petitioner made his Monday confession, while he was in a county courthouse.

In cases where a criminal suspect has not been made the subject of judicial proceedings, this Court has enunciated a policy restricting the suspect's right to have access to his counsel to cases similar to Escobedo v. Illinois, 378 U.S. 478 (1964), where the policemen interrogating the suspect had refused his repeated request to see his lawyer who was then present at the police station. See Michigan v. Tucker, 417 U.S. 438 (1974).

Sub judice, there is no testimony suggesting that Petitioner was refused access to his lawyer. Indeed, quite the reverse seems to be the case. While Sheriff Lee was not certain as to the particular time when Petitioner requested to see an attorney, he was positive that Petitioner was advised of all of his rights and given every opportunity to contact an attorney or any other persons. Since there were no judicial proceedings initiated against Petitioner when he confessed and since he was given every opportunity to contact an attorney and since Petitioner was not physically or psychologically coerced to confess, there can be no doubt that Petitioner has been accorded every constitutional right to which he was entitled.

It is further suggested by Petitioner that Michigan v. Mosley, 423 U.S. 96 (1976) supports his claim of the denial of his Fifth and Sixth Amendment rights. A review of that case shows differently. Michigan v. Mosley, supra, related to the question of whether a resumption of interrogation approximately two hours after a criminal suspect communicated that he did not desire to talk with police authorities violated the suspect's constitutional rights. This Court held that the suspect's right in that case was not violated where a reasonable time had elapsed since the suspect communicated his desire not to speak and Michigan police re-advised Petitioner of his Miranda rights before interrogating him on a second occasion. In the present case, Sheriff Lee advised Petitioner of his Miranda rights prior to each interview even though the record indicates that Sheriff Lee did not interrogate Petitioner in connection with the Monday and Tuesday confessions. In addition, the Monday confession occurred one day after Petitioner was first interviewed. Thus, to the extent that it can be said that Michigan v. Mosley, supra, is applicable, it supports the position of Respondent.

Sims v. Georgia, 385 U.S. 538 (1966), which Petitioner also relies upon, has no bearing upon the present case. The Sims case involved the failure of the trial court to accord the petitioner a hearing in accordance with this Court's ruling in Jackson v. Denno, supra. In the present case, a hearing in accordance with Jackson v. Denno, supra, was held. It would appear therefore that the Sims case has no applicability to this case.

C. WHERE THE PETITIONER WAS REPRESENTED BY COUNSEL AT LEAST THREE MONTHS PRIOR TO TRIAL AND RETAINED ADDITIONAL COUNSEL FIVE DAYS PRIOR TO TRIAL, HE WAS NOT DEPRIVED OF A FAIR TRIAL.

Petitioner urges the Court to grant a writ of certiorari in this case on the basis that the refusal of the trial court to grant him a continuance of one week deprived him of a fair opportunity to defend. The issue which Petitioner raises has been discussed by the courts extensively. United States v. Mason, 440 F.2d 1293 (10th Cir. 1971); Sykes v. Commonwealth of Virginia, 364 F.2d 314 (4th Cir. 1966); Eubanks v. United States, 336 F.2d 269 (9th Cir. 1964); Puglie v. United States, 343 F.2d 837 (1st Cir. 1965); United States v. Ray, 351 F.2d 554 (8th Cir. 1963). It is settled that whether a request for additional time is to be granted is a matter for the trial court's discretion. United States v. Mason, supra. In exercising its discretion, the trial court is authorized to evaluate the facts and circumstances of each case. In view of the decisions dealing with the point which Petitioner has raised in connection with his motion for a continuance, it is apparent that Petitioner has failed to raise an issue worthy of consideration by this court.

Particularly, Petitioner's contention that he was deprived of fundamental fairness due to inadequate time to prepare for trial is meritless in the context of the present case. The case for the State consisted primarily of a confession by Petitioner. Petitioner's defense was to have the trial court exclude the confession. Any unacceptable behavior by the Douglas County Sheriff's Department could have easily been disclosed by Petitioner at trial. Secondly, Petitioner was represented by an attorney for approximately three months prior to trial, this attorney continued his representation of Petitioner at trial. The hiring of present counsel was done at the behest of Petitioner. Except for some seeming criticism of the first attorney retained to represent him, Petitioner raises no substantive reasons for a continuance. Petitioner contents himself with the argument that the record fails to reflect any service rendered by that attorney. The lack of a court record is not a true indication that Petitioner's former attorney failed to render services to Petitioner. Thirdly, Petitioner's trial involved primarily fact issues. There was no question as to the presence of Petitioner at the time the victim was shot. The only question was whether the victim had been shot as the result of an accident.

The person who knew the facts was Petitioner and he was available to present counsel several days prior to trial. Finally, Petitioner's trial counsel had five days in which to prepare for trial. In view of the fact that the present case involved issues of fact which were within the knowledge of Petitioner, five days were clearly more than adequate time in which to prepare for trial.

D. PETITIONER'S CLAIM THAT THE TRIAL JUDGE IMPROPERLY REINSTRUCTED THE JURY IS SO INSUBSTANTIAL THAT THIS COURT SHOULD DENY THE PETITION FOR THE WRIT OF CERTIORARI.

Petitioner's final contention is that this Court should grant his petition for writ of certiorari because the trial court deprived him of due process by failing to reinstruct the jury on accident when it reinstructed the jury on the offenses of murder, voluntary manslaughter and involuntary manslaughter. Unquestionably this contention presents an insubstantial issue to the court.

It is now clearly settled that the feasibility and scope of any reinstruction of the jury is a matter residing within the discretion of the trial judge. Whiting v. United States, 321 F.2d 72, 75 (1st Cir. 1963), cert. den. 75 U.S. 884, 11 L.Ed. 2d 114 (1963); United States v. Salter, 346 F.2d 509, 512 (6th Cir. 1965); Allen v. United States, 186 F.2d 439, 444 (9th Cir. 1951); United States v. Wharton, 433 F.2d 451 (D.C. Cir. 1970). Indeed, one court has said that it is elementary that a supplemental charge is to be read in connection with, and in context with, the original charge. Albizu v. United States, 88

F.2d 138 (1st Cir. 1937), cert. den. 301 U.S. 707, 81 L.Ed. 1361 (1937).

In the present case the jury requested that the trial court reinstruct it as to the offenses of murder, voluntary manslaughter and involuntary manslaughter. The trial court complied with this request exactly. That the trial court did not reinstruct the jury with respect to the defense of accident was not an abuse of its discretion. Since the court instructed the jury on the defense of accident in its original instruction and since the supplemental charge is to be read in connection with the original charge, it is obvious that a reinstruction is not subject to any attack to which the original charge is not also subject. In addition, the trial court's reinstruction as to the offenses of murder, voluntary manslaughter and involuntary manslaughter did not prejudice the jury's consideration of Petitioner's defense of accident as the elements of those offenses are independent of the accident defense.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari to review the judgment of the Court of Appeals of Georgia be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Brief for the Respondent in Opposition upon Mr. J. Melvin England, Counsel for Petitioner, Suite 1016, 250 Piedmont Ave., Atlanta, Georgia 30308, by depositing same in the United States mail, properly addressed with sufficient postage prepaid.

This ___ day of _____,1977.

JOHN C. WALDEN